U.S. 867 (1996); *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1990). However, Petitioner will never know what the subpoenaed individuals' testimony would have revealed during the trial because the district court abused its discretion when it prevented these witnesses from testifying. The district court's abuse of its discretion justifies a reversal by this court. *Green v. American Airlines, Inc.*, 804 F.2d 453 (8th Cir. 1986); *Vassar v. Solem*, 763 F.2d 975 (8th Cir. 1985); *Warner v. Transamerica Insurance Company*, 739 F.2d 1347 (8th Cir. 1984).

Messrs. Carbol, Caruso, and McClintock were all listed on Petitioner's Witness List filed with the district court and served on Respondent's counsel. As previously stated, these individuals were properly disclosed before trial through the deposition testimony of Respondent's own witness, Mr. Eaves, and would have presented non-cumulative testimony. Allowing this testimony would more likely than not produce a different result at a new trial. For these reasons, the district court's refusal to enforce Petitioner's subpoenas constituted an abuse of discretion as well as reversible error. *Manning v. Lockhardt*, 623 F.2d 536, 539-40 (8th Cir. 1980) (district court's refusal to issue subpoena and allow important testimony for plaintiff constituted an abuse of discretion as well as reversible error); *see also, Wilson v. State Farm Fire & Cas. Ins. Co.*, 88 Fed. Appx. 810 (5th Cir. 2004) (district court committed reversible error when it, *sua sponte*, excluded a witness' testimony for reasons of incompetency). Justice dictates that this Writ be granted.

CONCLUSION

For the aforementioned reasons, Petitioner's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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Counsel for Petitioner
Charles Pointer

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04-2425

[Decided September 8, 2005]

Charles Pointer	)
Plaintiff-Appellant,	)
	)
v.	)
	)
DART,	)
Defendant-Appellee.	)
	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04-2425

[Filed August 1, 2005]

Charles Pointer	)
Plaintiff-Appellant,	)
	)
v.	)
	)
DART,	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court for the Eastern District of Missouri

OPINION

WOLLMAN, Circuit Judge.

Charles Pointer appeals from the district court's denial of his motion for a new trial following a jury verdict adverse to his claims of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. We affirm.

I.

Pointer is an African American male who holds a master's degree in counseling education. From January 7, 2000, to May 18, 2000, he was employed as an outpatient counselor by Drug Alcohol Rehabilitation and Treatment, Inc. (DART), a drug and alcohol treatment organization in St. Louis, Missouri. Pointer's employment contract with DART stipulated that he could be "terminated with or without cause, and with or without notice, at any time, at the option of either DART or himself, except as otherwise provided by law."

DART contracted with the Probation and Pretrial Services Office of the United States District Court for the Eastern District of Missouri (Office) to provide services on their behalf. Milford Eaves, a DART employee, directed the contract program and supervised Pointer. When Eaves took a leave of absence, he selected Cheryl Gardine (a Caucasian female) instead of Pointer to be his temporary replacement. Eaves testified that although Gardine was "technically" unqualified for the position because she lacked a master's degree (a requirement under DART's contract with the Office), the appointment was "considered an interim procedure and not something that would be implemented beyond . . . a temporary period of time." Eaves also testified that Office employees Kevin Carbol, Dan McClintock, and Thomas Caruso had indicated to him that they were comfortable with Gardine's performance and supported her selection for the temporary position.

Pointer's clients included individuals on parole and serving probation who were referred by the Office. Eaves testified that Carbol and McClintock complained to him about Pointer's performance. Eaves stated that Carbol told him on two or three occasions that he had difficulty reading Pointer's

notes and was surprised and disappointed by Pointer's low documentation standards and that Carbol admonished him "for not finding a replacement [for Pointer] sooner." According to Eaves, McClintock also complained to him about Pointer at least twice. Eaves shared these concerns with senior managers at DART, who instructed him to resolve the problem.

Eaves met with Pointer on several occasions to discuss his work performance. One of the issues that they discussed was Pointer's handwriting. Because Pointer's cursive was difficult to read, Eaves asked Pointer to write in print. When Pointer's handwriting remained illegible, Eaves gave Pointer a "supervision document" that set forth a time frame for him to improve his handwriting. When Pointer continued to show a lack of improvement, Eaves fired him. Pointer's termination letter indicated that he was fired for "clinical documentation deficiencies." The letter indicated that Eaves had discussed these and other issues with Pointer on three prior occasions, and Pointer acknowledged by signing at the bottom of the letter that he had been given an opportunity to correct them.

Pointer sued DART for racial discrimination, alleging failure to promote (arising from Eaves's selection of Gardine rather than Pointer as his temporary replacement) and wrongful discharge. After deposing Eaves, Pointer requested informal interviews with Carbol, McClintock, and Caruso. The Office denied this request and suggested that Pointer subpoena the individuals. Pointer served all three with subpoenas and filed a motion to enforce the subpoenas.[1] At a

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[1] Pointer apparently filed his motion after the district court *sua sponte* scheduled a hearing to determine whether the subpoenas would be enforced. It appears that the Assistant United States Attorney representing the Office had contacted the district court *ex*

hearing on the motion, Pointer argued that the testimony of the Office employees could undermine Eaves's contention that he fired Pointer at their behest and under pressure from them. The district court ordered that the Office produce a copy of its contract with DART, which would establish that anything that Office employees said to Eaves would have had "no legal effect" because DART's personnel decisions were its own responsibility. The district court then denied the motion to enforce the subpoenas.

The matter proceeded to trial, and a jury found in favor of DART. The district court denied Pointer's motion for a new trial (which asserted that Pointer had been prejudiced by the district court's decision not to enforce the subpoenas), noting that "even assuming that Plaintiff could demonstrate that the subpoenas at issue should have been enforced, Plaintiff has failed to persuade the Court that testimony from the probation officers would likely have produced a different result in this case."

II.

We review orders quashing a subpoena for abuse of discretion. *Miscellaneous Docket Matter #1 v. Miscellaneous Docket Matter #2*, 197 F.3d 922, 925 (8th Cir. 1999). On timely motion, a district court shall quash or modify a subpoena if the subpoena fails to allow reasonable time for compliance, requires a witness who is not a party to travel more than 100 miles, requires disclosure of privileged or protected matter, or subjects a person to undue burden. Fed. R. Civ. P. 45(c)(3)(A)(iii). A subpoena must also seek relevant information. *Roberts v. Albright-Roberts Chevrolet*,

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parte and urged it to rule on the matter.

Inc., 352 F.3d 358, 360-62 (8th Cir. 2003); Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . ."). We review relevancy determinations for abuse of discretion. Roberts, 352 F.3d at 360 (citation omitted).

The district court failed to identify any of the reasons listed in Rule 45 as the basis for its decision to deny Pointer's motion to enforce the subpoenas. Further, nothing in the record suggests that any of the subpoenaed witnesses would be inconvenienced (all three worked in the same courthouse in which they were called to testify) or that Pointer sought privileged information through their testimony. Whether the testimony of the Office employees was relevant is a closer call. The district court assumed that the testimony was not relevant because the Office employees had no control over DART's personnel decisions. Pointer, however, intimated that he sought the testimony for impeachment purposes, not to establish the Office's influence on personnel decisions. Mot. Hrg. Tr. at 3 ("This is a case where [Eaves] said, 'These men told me to do it, and I've done it.' And we just want to find out if that's the truth."). The potential testimony thus fell within the broad scope of Rule 26. Accordingly, we conclude that the district court abused its discretion in denying the motion to enforce the subpoenas.

III.

Although the district court erred in failing to enforce the subpoenas, Pointer must also show that the district court abused its discretion in denying his motion for a new trial. *See O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1991) (citation omitted). To do so, he must demonstrate that the district court's evidentiary error affected his substantial rights. *Id.*; see also Fed. R. Evid. 103(a) (erroneous

evidentiary ruling must affect a substantial right of the party). The error must be such that a new trial "would be likely to produce a different result." *O'Dell*, 904 F.2d at 1200 (citation omitted). The trial court is in the best position to determine whether the alleged error affected the substantial rights of any party sufficient to warrant a new trial, and the trial court's decision is entitled to considerable deference. *Id.* (citation omitted).

Eaves testified in his deposition that Carbol and McClintock pressured him about finding a replacement for Pointer because Pointer's work "did not fall within what they considered to be appropriate or professional documentation standards." Pointer's theory of prejudice is that, had the district court enforced the subpoenas, Carbol and McClintock would have denied Eaves's allegations, which "undoubtedly would have called into question[] [Eaves's] credibility and affected the outcome of the trial." Pointer Reply Br. at 9.[2] Pointer's speculative assumption as to what Carbol and McClintock's testimony would have been is unsupported by the record. Cf. *Manning v. Lockhart*, 623 F.2d 536, 540 (8th Cir. 1980) (district court's refusal to grant subpoena prejudiced plaintiff when the transcript made clear that the witness would have provided key testimony in support of plaintiff's claim).

The jury apparently found Eaves's testimony credible. From the record we have before us, we cannot conclude that it is likely that, had the subpoenas been enforced, Carbol and McClintock would have contradicted Eaves's testimony and the jury would have rejected Eaves's stated reasons for firing

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[2] Pointer does not argue that he was prejudiced by the district court's failure to enforce the subpoena served on Caruso.

Pointer and instead concluded that he fired Pointer because of his race.

The judgment is affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF
MISSOURI EASTERN DIVISION

No. 4:02CV00469 JCH

[Filed May 17, 2004]

Charles Pointer)
Plaintiff,)
)
v.)
)
DART,)
Defendant)

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff's Motion for a New Trial (Doc. # 73). Defendant has filed a Memorandum in Opposition to Plaintiff's Motion (Doc. # 75), and the matter is ready for disposition.

BACKGROUND

After being terminated from his position with Defendant DART, Plaintiff brought this suit alleging that he had been

subjected to discrimination on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*.

Prior to trial, Plaintiff, through his counsel, issued subpoenas to Mr. Kevin Carbol, a U.S. Pretrial Services Officer, Mr. Thomas Caruso, a U.S. Probation Officer, and Mr. Dan McClintock, also a U.S. Probation Officer. (Plaintiff's Memo of Law in Support of his Motion for a New Trial ("Plaintiffs Memo of Law"), P. 1). Plaintiff contends that these subpoenas were issued in response to allegations that these men were involved in the adverse decision at issue in this case. (Plaintiff's Memo of Law, P.2). It is uncontested that these men were not employed by Defendant.

The Court held a hearing on January 8, 2004 to determine whether these subpoenas should be enforced. After hearing arguments from counsel for both sides, the Court determined that the subpoenas would not be enforced. The Court did order, however, that both parties be given access to a copy of the contract detailing the relationship between Defendant and the U.S. Probation and Parole Service.

Following a three-day trial, the jury found in favor of Defendant on all counts. Plaintiff now contends that he is entitled to a new trial under Rule 59 of the Federal Rules of Civil Procedure on the grounds that the Court committed reversible error by not enforcing the subpoenas against Mr. Carbol, Mr. Caruso, and Mr. McClintock.

DISCUSSION

"The authority to grant a new trial on a motion pursuant to Federal Rule of Civil Procedure 59 is within the discretion of the district court." *Douglas Cty. Bank & Trust Co. v. United*

Financial Inc., 207 F.3d 473, 478 (8th Cir. 2000) (Citations omitted). The admission of evidence is similarly "committed to the sound discretion of the district court." *Bevan v. Honeywell*, 118 F.3d 603, 612 (8th Cir. 1997). In order to demonstrate that a new trial is warranted in this case, Plaintiff must demonstrate that the exclusion of evidence, if erroneous, was "so prejudicial that a new trial would likely produce a different result." *Id. See also, Children's Broadcasting Corp., v. The Walt Disney Co.*, 357 F.3d 860,867 (8th Cir. 2004); *Wheeler v. Missouri Highway & Transportation Commission*, 348 F.3d 744,749 (8th Cir. 2003); *Schultz v. McDonnell Douglas Corp.*, 105 F.3d 1258,1259 (8th Cir. 1997) (Citations and internal quotations omitted).

Upon careful review of the record and application of the above standards, the Court finds Plaintiff's contentions to be without merit. Even assuming that Plaintiff could demonstrate that the subpoenas at issue should have been enforced, Plaintiff has failed to persuade the Court that testimony from the probation officers would likely have produced a different result in this case.

Defendant presented substantial evidence to support its contentions that Plaintiff was terminated because of deficiencies in his performance and that race did not play a part in the decision, and the jury was entitled to credit that evidence. A new trial is not warranted under these circumstances.

CONCLUSION

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's Motion for a New Trial (Doc. # 73) is **DENIED**.

Dated this 17th day of May, 2004.

/s/ _____
Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF
MISSOURI

No. 4:02CV00469 JCH

[Filed January 28, 2004]

Charles Pointer	)
Plaintiff,	)
	)
v.	)
	)
DART, INC.,	)
Defendant	)
	)

JUDGMENT IN A CIVIL CASE

[X] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS HEREBY ORDERED AND ADJUDGED that On the failure to promote claim of Plaintiff, Charles Pointer, as submitted in Instruction No. 10, we find in favor of: Defendant Dart. Has it been proved by the greater weight of the evidence that Defendant would have failed to promote Plaintiff regardless of his race? (YES); On the wrongful

termination claim of Plaintiff, Charles Pointer, as submitted in Instruction No. 11, we find in favor of: Defendant Dart. Has it been proved by the greater weight of the evidence that Defendant would have discharged Plaintiff regardless of his race? (YES)

James G. Woodward
CLERK

DATE January 28, 2004

By: /s/ _____
M. Mosley
DEPUTY CLERK

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF
MISSOURI

No. 4:02CV00469 JCH

[Filed January 28, 2004]

Charles Pointer	)
Plaintiff,	)
	)
v.	)
	)
DART, INC.,	)
Defendant	)
	)

VERDICT 1

On the failure to promote claim of Plaintiff, Charles Pointer, as submitted in Instruction No. 10, we find in favor of:

Defendant DART

Note: Answer the next question only if the above finding is in favor of Plaintiff. If the above finding is in favor of

Defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Has it been proved by the greater weight of the evidence that Defendant would have failed to promote Plaintiff regardless of his race?

X Yes

/s/ _____
Sally S. Weaver
Foreperson

Date January 28, 2004

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF
MISSOURI

No. 4:02CV00469 JCH

[Filed January 28, 2004]

Charles Pointer	)
Plaintiff,	)
	)
	)
v.	)
	)
	)
DART, INC.,	)
Defendant	)
	)

VERDICT 2

On the wrongful termination claim of Plaintiff, Charles Pointer, as submitted in Instruction No. 11, we find in favor of:

Defendant DART _____

Note: Answer the next question only if the above finding is in favor of Plaintiff. If the above finding is in favor of

Defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Has it been proved by the greater weight of the evidence that Defendant would have discharged Plaintiff regardless of his race?

X Yes

/s/ _____
Sally S. Martin
Foreperson

Date January 28, 2004